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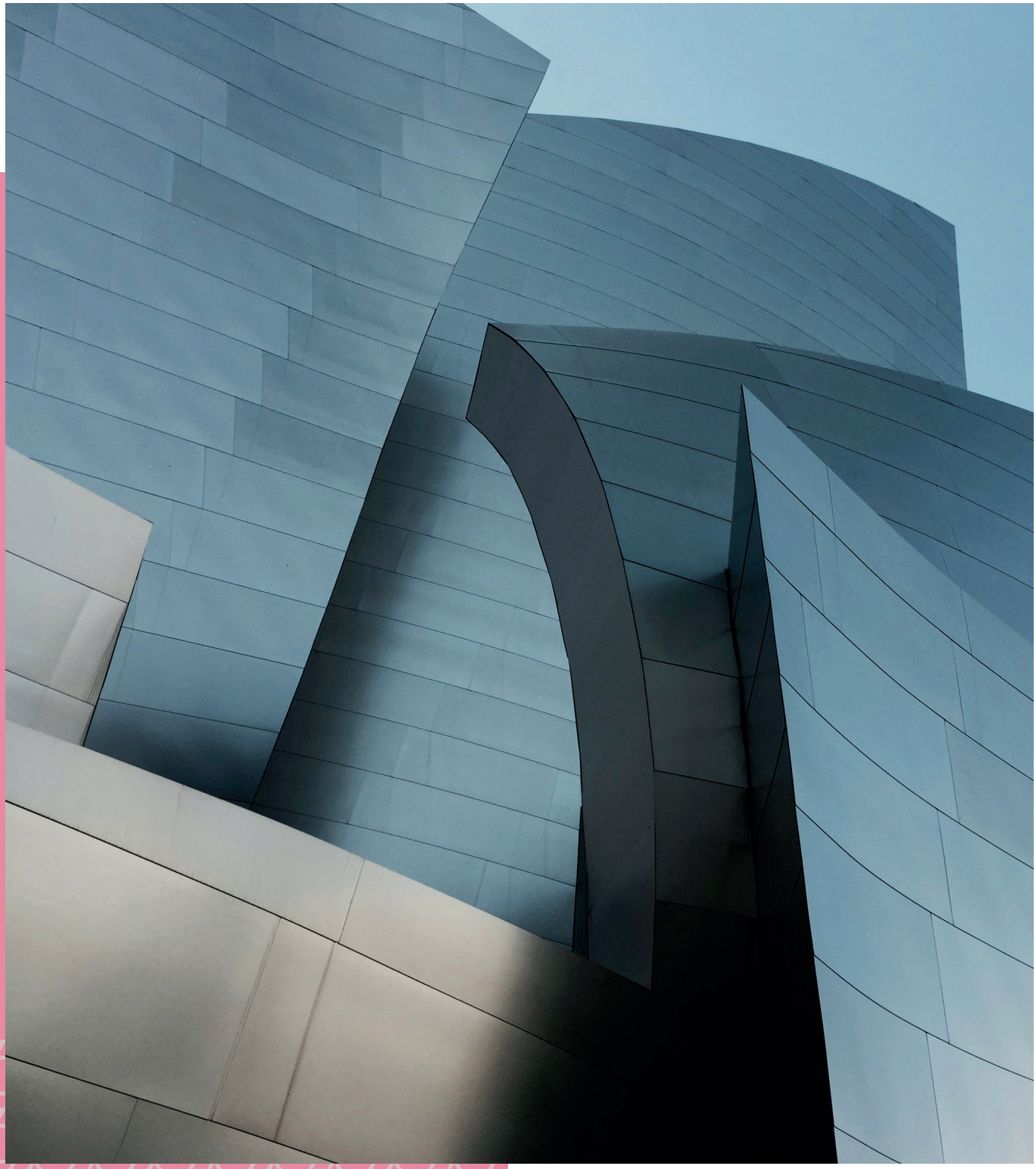
Aggregate



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Welcome.

In this edition of Aggregate:

- Adam looks at a recent case which considered the limits of natural justice for the purposes of adjudication challenges. For those hoping it represents a new gateway to resisting enforcement, it's actually just a reminder of the high threshold that enforcement challenges face.
- Recently-joined Katrina considers some of the construction-related announcements in the recent Budget, and what impact they may have on the housing sector in particular.
- Liam considers a case which restates the need to pay now, argue later, when it comes to 'true value' adjudications.
- Hanna and Molly recap their recent webinar on procurement, contractual relationships, and design.
- And finally, we have some firm news, covering new recruits, promotions, and our ongoing Construction Law Training webinar series.

We hope you enjoy this edition, and as ever, if you have any ideas for future articles or other feedback, do please get in touch.

Oli
Editor-in-Chief

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The Limits Of Natural Justice

A recent case in the TCC serves as another statement that it will rarely entertain breach of natural justice arguments to resist the enforcement of an adjudicator's decision. Although a losing party in an adjudication may consider itself to have legitimate cause for complaint as to how an adjudicator has reached and, more to the point, expressed their decision, it will only be in the most exceptional circumstances that the TCC will intervene.

Adam Brown
Legal Director

Facts

The case was *Clegg Food Projects Limited v. Prestige Car Direct Properties Limited* [2025]

Prestige employed Clegg under an amended JCT D&B contract for the construction of a leisure and retail centre in Bishop Auckland. A dispute arose concerning Clegg's application for payment and so Clegg commenced a true value adjudication. The dispute included the quantum of eight variations (liability was not in dispute) and Clegg's entitlement to extensions of time and prolongation costs.

Somewhat unusually, the adjudication spanned three months from October 2024 to January 2025 with six rounds of submissions. Both parties submitted that the Adjudicator should decide the gross valuation of the application using their respective figure or "such other sum as the Adjudicator may decide".

In an 88-page Decision, the Adjudicator awarded Clegg a principal sum of £541,880.12 plus VAT together with interest. For five of the eight variations, the Adjudicator opted to use his own fair and reasonable rate as determined by his own "first principles view" of the work involved. He also introduced a single new measurement in his valuation of the account. The Adjudicator did so without informing the parties beforehand of his proposed valuation methodology. Prestige refused to pay what was awarded and Clegg applied to the TCC to enforce the Decision.

The Enforcement Proceedings

The TCC was tasked with addressing two main issues:

1. Whether the Adjudicator's failure to give the parties an opportunity to comment on his proposed valuation methodology constituted a breach of natural justice; and
2. Whether the Adjudicator failed to provide sufficient reasons in his Decision to explain his valuation methodology.

> *"It will only be in the most exceptional circumstances that the TCC will intervene*
>
> **Adam Brown**
> Legal Director

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Issue 1 – Failure to give opportunity to comment

Prestige argued that the Adjudicator overstepped in deciding new rates and a new measurement without the parties being consulted. It contended that this was not just a case of the Adjudicator crudely spitting the difference between the parties, but rather an entirely novel analysis not submitted by either party.

On the other hand, Clegg argued that the Adjudicator was entitled to use his own knowledge and experience to determine the gross valuation of the application and that the Adjudicator's assessment of each overall variation was within the range established by the parties' respective submissions. Further, Clegg pointed out that, in all but two cases, the new rates adopted by the Adjudicator in the sub-items that made up each of the variations were more advantageous to Prestige than if the Adjudicator had simply accepted Clegg's rate and, in some cases, if Prestige's own rate had been adopted. Even then, those two exceptions had a minimal impact on the total amount awarded to Clegg - just £2,600, or 0.2%, of the Adjudicator's total valuation.

Finding in favour of Clegg on this issue, the TCC emphasised that both parties invited the Adjudicator to award the amount each of them submitted 'or such other sum as the Adjudicator determined'. It was therefore within the Adjudicator's remit to arrive at a different valuation for a particular item in the account. He was not obliged to consult the parties on every element of his thinking or to seek further submissions as to his proposed valuation methodology because the parties had already provided him with the information he needed to reach his Decision. While the TCC accepted the Adjudicator could not have gone on a frolic on his own, that would only have been the case if the Adjudicator decided the rates without any consideration of the parties' submissions.

In any event, even if there was a breach of natural justice, the TCC agreed with Clegg that it would not have been material. This is because Prestige accepted the Adjudicator could have just adopted Clegg's higher rates and, in the limited examples where the Adjudicator applied an even higher rate, the effect this had on the total valuation was minimal. Prestige's approach of nitpicking the Adjudicator's rates in certain sub-items of the variations was therefore deemed "excessively granular".

Issue 2 – Failure to provide sufficient reasons

Prestige also argued that, because the Adjudicator provided additional workings post-Decision, this suggested that further explanation was needed for the parties to understand his valuation methodology. It said that absent a full understanding of how the Decision was reached, it was impossible to know what defences it might have raised.

Clegg contended that the overall determinations for each of the variations were between the parties' overall respective positions. It said the Adjudicator was not bound to accept the entirety of either party's case. Rather, his task was to value each variation pursuant to the terms of the underlying contract, which is precisely what the Adjudicator said he did. Clegg also highlighted it was unrealistic to insist on a detailed description of how a rate was determined for every sub-item that made up each variation.

Again finding in favour of Clegg, the TCC accepted the reasons given by the Adjudicator were "broad brush", but said they were sufficient. Part of the difficulty for Prestige was that it asked the Adjudicator to provide the additional workings. It did not automatically follow from this request that the Adjudicator failed to provide adequate reasons in his initial Decision. Detailed workings on each sub-item of a variation were not required and there was sufficient detail in the Decision to enable the parties to understand how he reached it "in the round".

Take-Aways

The TCC enforced the Decision in full. This case therefore reinforces the TCC's pro-enforcement stance and underlines that breach of natural justice arguments are rarely successful in resisting enforcement.

Where a defendant's complaint effectively boils down to it not having an opportunity to comment on every sub-issue forming part of a dispute and the Adjudicator has been afforded a wide jurisdiction to determine that dispute, the defendant is very unlikely to be successful. This is particularly the case in a true value adjudication where the adjudicator is to determine the gross valuation of an application and the adjudicator's decision results in a finding that sits between the two parties' overall positions.

Additionally, it can almost always be argued that an adjudicator could have given more detailed reasons, but that alone will not be enough to resist enforcement.

Key takeaways for housing sector in a 'budget for benefit street'

At Archor development is our 'thing'. And so we took a keen interest in the what the Chancellor had to say in her November Budget, and how those announcements could affect development projects moving forward.

Katrina Bretten
Legal Director

As the dust begins to settle in the wake of the Budget, it is clear that although housing was certainly not the focus, there are nevertheless a number of key takeaways for the sector – including that the OBR has now revised down its forecast of the number of new homes to be delivered during this Parliament.

Labour originally pledged to deliver 1.5million homes in England alone between 2024-25 and 2029-30, however, is anticipated to miss that. The OBR now expects only 1.49million homes to be delivered across the whole of the UK during the same period.

Despite this disappointing forecast, the Budget included some key takeaways which could yet provide some glimmers of hope for the housing sector as we move into 2026.

Devolution of Funding

In line with the Government's 'Plan for Change' introduced in June this year, the Chancellor announced that a quarter of the National Housing Delivery Fund, set to launch next spring, will be devolved. With the Government keen to ensure that "money and power [is put] in the hands of local and regional leaders"; around £1.3bn of the funding pot will now go to mayoral strategic authorities through the integrated settlement.

More funding for regeneration outside of London is another element of the Government's devolution drive. In particular:

- £902million in funding over four years will be provided to mayors in the 11 areas of the North and Midlands with the most growth potential;
- A new £500million Mayoral Revolving Growth Fund will allow mayors in the same regions to invest in growth projects alongside the private sector; and
- Starting from February 2026, mayoral strategic authorities will be able to bid for (and set priorities for) around a fifth of the new Social and Affordable Homes Programme, established with the intent of providing up to £39billion in funding, and delivering up to 300,000 new homes over the next 10 years.

More Planners

With planning applications for new homes at a record low, and 100,000s of planned homes stuck in the planning system, housing delivery is also hampered by delays in this system.

In an effort to combat this, the Chancellor also announced a £48million recruitment drive in the planning sector – with the aim of bringing 350 new planners into the system.

While this is encouraging, the fact that so many homes are stuck in the planning system shows that the planning process is extremely complex, and so we will have to wait to see how effective the introduction of new, potentially inexperienced planners will be.

Conclusion

Prior to the Budget, it was reported that the overall construction spend in the UK was contracting across housing and other sectors, and Bank of England research suggested that employment was falling as well.

What impact the Budget and new funding streams announced will have on the housing sector of course remain to be seen. However, at least the pre- Budget uncertainty has now ended, which may unlock some transactions. And to end on some positivity, real world data from the Office for National Statistics suggests that construction output figures are slightly above what had been expected.

Own Goals In Adjudication:

Beware Outstanding Notified Sums

Construction law aficionados will be well-versed on the interaction between notified sums and true value adjudications: a paying party must pay an outstanding notified sum before starting a true value adjudication.

The principle above was extended further in *VMA Services Limited v. Project One London Limited* [2025], where the court decided that the referring party in a true value adjudication should pay the responding party an outstanding notified sum.

Our summary of the case and practical takeaways for parties is below.

Liam Hendry
Senior Associate

Background

In October 2023 Project One London Limited engaged VMA Services Limited to design and install mechanical works at a project in London.

On 24 June 2024 VMA submitted its payment application number 8 to Project One for a net sum of around £106k. Project One didn't issue any notices in response, and neither did it pay the sum claimed by VMA.

In December 2024 Project One started a true value adjudication. The parties made submissions in the adjudication regarding Application 8, including in relation to the adjudicator's jurisdiction. The adjudicator decided that Project One should pay the outstanding notified sum in Application 8, and declined to decide the true value of VMA's works as Project One had wanted.

VMA subsequently issued enforcement proceedings. Project One resisted enforcement on the basis that the adjudicator did not have jurisdiction to award a "reverse" payment to VMA, which had been the responding party in the 'true value' adjudication that Project One had attempted.

> *"A paying party must pay an outstanding notified sum before starting a true value adjudication*
>
> **Liam Hendry**
> **Senior Associate**

Court's decision

The court began its decision by reiterating the default legal position:

- A paying party cannot start a true value adjudication without having paid any outstanding notified sum first (*Bexheat Ltd v. Essex Services Group Ltd* [2022]).
- The above principle even applies where there is no adjudication decision regarding the notified sum (see *AM Construction v. The Darul Amaan Trust* [2022]).
- A responding party in an adjudication can make a counterclaim to set off a claim, but an adjudicator does not usually have jurisdiction to order a payment to the responding party.

Regarding the jurisdiction issue, the court referred to the decision in *WRW Construction Limited v. Datblygau Davies Developments Limited* [2020], in which the court enforced an adjudication decision ordering the referring party to pay money to the responding party.

The court followed the decision in this case and stated that, despite the usual position, it should follow the adjudicator's decision where they decided that a notified sum was due to VMA and the parties were bound by the decision. The court noted that it would be an "*arid exercise*" to make VMA commence another adjudication decision for an order for payment.

The court therefore decided that the adjudicator had jurisdiction and enforced the decision in VMA's favour.

Takeaways

This case is another affirmation of the "pay now, argue later" policy underlying the Construction Act. It further enhances the status of notified sums by subverting the usual principle that a responding party cannot recover money in an adjudication.

The case gives rise to some important lessons for parties to adjudications. Payer referring parties should carry out a review for any outstanding notified sums before starting a true value adjudication – otherwise a similar result to that in *VMA v. Project One* could follow, which essentially ended up with Project One scoring an own goal. Payee responding parties can use any outstanding notified sums to resist jurisdiction or recover the money in the adjudication – the strategy depends on the amount and strength of the notified sum.

> *"It further enhances the status of notified sums by subverting the usual principle that a responding party cannot recover money in an adjudication*

Liam Hendry
Associate

Procurement, Contractual Relationships, And Design

Hanna McNab
Partner

Molly Lockerbie
Associate

If you were unlucky enough to miss our webinar on procurement, contractual relationships and design, we have provided a short and sweet summary of everything covered.

Procurement

The first part of our webinar touched on procurement and the different routes that construction projects take, the most well-known being the 'traditional' and 'design and build' routes, with a third being a combination of these involving a contractor's design portion.

1. Traditional

The client employs a set of design professionals, typically an architect, engineer, MEP consultant, and a set of non-design professionals. The design professionals will carry out the design of the whole scheme. The client will appoint the contract administrator separately, which could be the architect or could be a quantity surveyor/project management practice. There will also be a CDM Principal Designer and Building Regulations Principal Designer.

Following the production of the design by the consultants, the client employs the building contractor to only carry out the work under the building contract, meaning they don't take on any design responsibility. The building contractor will further employ subcontractors to carry out aspects of the work, but again there is no design. That's your traditional procurement route: all design kept on client side. It was much more common in the 80s and 90s than it is now.

2. Design and Build

The second option and the most common and is "pure design and build". The client, at least theoretically, passes all design responsibility onto the contractor. The contractor will normally take on full design responsibility for anything produced by the client team, meaning that the client has a single party to point the finger at in the event anything goes wrong – the contractor.

A contractor typically 'novates' the consultant team, so that if anything has gone wrong with the design, the contractor can in turn point the finger at the relevant consultant.
A novation is the transfer of an interest from one party to another. Unlike assignment, novation transfers both the benefit and the burden to another - it is effectively the transfer of a contract between Party A and Party B to a contract between Party A and Party C. As such, the client initially appoints the design professionals who are then novated to the contractor.

This means the final position is that the design professionals are employed by the contractor, and by virtue of the novation all the rights are transferred to the contractor for anything that's done both pre and post-novation.

3. Contractor's Design Portion
There is a halfway house between the "pure traditional" and "pure design and build", where the client keeps control of certain parts of the design and transfers other parts to the contractor. These design elements are called the contractor's designed portions (CDPs), which are typically the unseen bits, or where the sub-contract supply chain is better at it – lifts for example. Other examples include piling, precast type products, mechanical and syphonic drainage etc. What the Employer keeps on their side is typically the aesthetic bit, often the bits that can be seen. It's quite common for an experienced client to go down this route because they can keep some control over the design that they're particularly bothered about, and let the other elements that needs to be functional be designed by the contractor.

There are other procurement routes including but not limited to construction management, management contracting and framework agreements, but this article would be very long if we tried to deal with them all in this article – perhaps one for another day!

Contractual relationships
We then moved on to the types of contract and the contractual relationships specific to the relevant procurement route. Whichever route is taken, the client will initially appoint professional consultants, both for design elements and non-design elements of the project.
There may also be a funding agreement in place with a party providing finance for the project. If there is a forward purchaser, there could be a sale agreement in place and if there is a tenant lined up, there will be an agreement for lease in place. Each of these agreements will include obligations that will need to feed into the building contract.
The Contractor will then be appointed and will in turn appoint sub-contractors and possibly sub-consultants. There may also be novated consultants. As you can imagine there are a whole host of documents flying around that need to be agreed!

Following the agreement of the building contract, appointments, novation agreements, sub-contracts etc, there will then be a need for collateral warranties. This is because you can't sue on a contract if you're not a party to it - known as privity of contract. You have to be a party to the contract to be able to sue someone under it.
A collateral warranty therefore bridges this gap, and creates a mini contract between the warrantor and the beneficiary – for example an architect may give a collateral warrant to a funder, tenant or purchaser.

A word of warning in relation to collateral warranties: the warranty is only as good as the underlying contract. So, if the warranty says that the warrantor can rely on any limitations in the appointment, sub-contract, main contract, or whatever the relevant underlying document is, you have to carefully review that document to make sure the warranty is of use to them. If the underlying contract caps the warrantor's liability to a certain level, any subsequent warranty will be subject to that same level.

Design
Finally, we discussed some points to consider when taking on design under a contract. Starting off, it is important to be clear about the standards that apply for each part of construction works:

- The test for workmanship is whether the work has been carried out in a good and workmanlike manner;
- The test for the quality of materials is whether they are fit for purpose; and
- The test for design is whether the design has been carried out using the reasonable skill and care of a designer.

"
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Hanna McNab & Molly Lockerbie
Partner & Associate

> *In summary, it is very important to get a good set of lawyers who can explain the risk of signing up to these clauses to you!*

Hanna McNab & Molly Lockerbie
Partner & Associate

It is vital that the skill and care referred to for design is the reasonable skill and care of a designer, otherwise you may be found to have a fitness for purpose obligation. A 1980 case *IBA v EMI and BICC* – explains why. Here, it was found that because there was no express reference to the nature of the duty of care for EMI (the contractor) towards IBA (the Employer) the contractor guarantees that the finished product is fit for purpose, and this includes the obligation for design. That is a high hurdle, and was a different standard that EMI had with its design consultant BICC, leaving EMI stuck in the middle.

As well as the above case, there is the more recent case of *MT Hojgaard a/s v E.ON Climate Renewables UK* [2014]. Here, it was accepted that the design carried out at the time was to the recognised standards, just that the standards were not correct. The contract, however, had conflicting clauses: one saying the contractor was to use the reasonable skill and care of a designer – which it did – and another tucked in the specification saying the foundations would have a design life of 20 years. The court said the latter was a fitness for purpose obligation, and that higher standard applied.

Why does this matter? Put simply, a fitness for purpose obligation is harder to meet than an obligation to carry out works with reasonable skill and care – the *Hojgaard* case is a good example. Also, if you sign up to a fitness for purpose clause for design it is very likely that you will not be covered for this on your insurance.

Another key point to consider when taking on design responsibility is the form of contract and the amendments made to any such contract. Consider for example who takes the risk for the site boundary, errors, omissions and discrepancies between the documents. Some contracts have huge numbers of documents and inevitably there will be discrepancies between them. If you take on full design responsibility under a "pure design and build", it will come as no surprise that the contractor will be taking on those risks. The standard form JCT Design & Build places the risk on the employer, however it is the market position for all of these clauses to be amended to reverse this risk on to the contractor. In summary, it is very important to get a good set of lawyers who can explain the risk of signing up to these clauses to you!

Conclusion

There are lots of risks involved in getting your contract set up wrong from the start – which is why being alive to these issues is so important. It will come as no surprise for us to say we can help – so do get in touch if you have any issues.

Archor News

It's been an exciting few months for Archor, as we look forward to our fifth birthday in June next year (how time flies!).

Most recently, Megan Green and Amelia Formoy have successfully completed their training and are now fully qualified solicitors.

Megan was the first fee earner to join Archor way back in 2021 when she joined in a year's in-work placement as part of her law degree, and we were delighted to welcome her back when she finished her course top of the class. Amelia joined as a paralegal in 2023 before quickly moving on to start her qualification exams.

Both Megan and Amelia have become integral parts of both the contentious and non-contentious teams, and just as importantly firm life. We're so delighted that they have achieved this milestone in their careers – the fifth and sixth trainee qualifications we've had at Archor – and look forward to them both going from strength to strength.

Just before that, at the start of October Katrina Bretten joined Archor as a Legal Director. Katrina is a non-contentious specialist, having practiced in construction law for 15+ years and with previous experience in real estate. She joins from a full-service law firm, and has also spent time working in house at a major local main contractor.

As with all at Archor, Katrina has experience working for a wide range of clients, including employers, developers, main contractors, sub-contractors and professionals. Her previous property experience also means she's well placed to work alongside property teams as part of development transactions.

Oli Worth
Editor-in-Chief

Meanwhile, Andrew and Hanna have been playing to sold out stadiums (well, something like that) as part of our 2025/25 Construction Law Training series. The first three modules have been very well received, with the remaining three in the New Year closing in on 1,000 registrations for each.

Focussing on JCT contracts but of general relevance, the sessions are intended as introductions for anyone in a role that has an interface with the legal landscape – for example QSs, project managers, and commercial managers and directors – or anyone that needs a refresher on the fundamentals of construction law. If you haven't already, you can still signup at archor.co.uk/webinartraining, and you can review the three webinars to date on that page too.

As we head toward the end of 2025, all that remains to be said is a big thanks to our clients and contacts for their continuing support – and from everyone at Archor, a very Merry Christmas. We look forward to a fantastic 2026, including news of our fifth birthday party in June – watch this space.

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